

CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Environmental Services

AGENDA DATE: April 24, 2012

CONTACT PERSON NAME AND PHONE NUMBER: Ellen A. Smyth, P.E., Director (915) 621-6719

DISTRICT(S) AFFECTED: All

SUBJECT:

That the City Manager be authorized to sign that certain Waste Exchange Agreement by and between the City of El Paso and El Paso Disposal, LP and Camino Real Environmental Center, Inc.

BACKGROUND / DISCUSSION:

The proposed agreement will allow on a quarterly basis and at no tipping fee except in certain circumstances for the City to deposit up to 15,000 tons of acceptable waste in the Camino Real Landfill and to allow for El Paso Disposal, LP to deposit up to 15,000 tons of acceptable waste in the Clint Landfill. The agreement will commence on May 1, 2012 and shall end no later than August 31, 2014.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

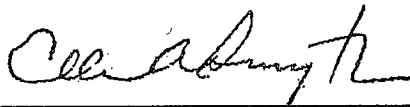
N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:



(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign that certain Waste Exchange Agreement by and between the City of El Paso and El Paso Disposal, LP and Camino Real Environmental Center, Inc. joined for approval purposes by its parent company Waste Connections, Inc., to allow, on a quarterly basis and at no tipping fee except in certain circumstances, for the City to deposit up to 15,000 tons of acceptable waste in the Camino Real Landfill and to allow for El Paso Disposal, LP to deposit up to 15,000 tons of acceptable waste in the Greater El Paso Regional Landfill.

ADOPTED this _____ day of _____, 2012.

CITY OF EL PASO:

John F. Cook
Mayor


ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:



Ellen A. Smyth, P.E., Director
Environmental Services Department

STATE OF TEXAS)
)
COUNTY OF EL PASO)

WASTE EXCHANGE AGREEMENT

THIS WASTE EXCHANGE AGREEMENT (this "Agreement") is entered into upon and is effective _____, 2012, by and between the CITY OF EL PASO, a home rule municipal corporation (the "City,") and EL PASO DISPOSAL, LP, a Texas limited partnership ("EPD") whose principal place of business is located at 5539 El Paso Drive, El Paso, Texas 79905, and CAMINO REAL ENVIRONMENTAL CENTER, INC., a New Mexico corporation ("Camino Real"), both of the latter parties being wholly owned subsidiaries of WASTE CONNECTIONS, INC., a Delaware corporation (the City, EPD and Camino Real, each a "Party" and collectively, the "Parties").

WITNESSETH:

WHEREAS, the City operates a landfill referenced as the Greater El Paso Regional Landfill, which is open to commercial haulers in El Paso County, Texas; and

WHEREAS, Camino Real operates the Camino Real Landfill in Sunland Park, New Mexico, which receives solid waste generated in El Paso, TX, and the surrounding region and which is open to all solid waste haulers in the area, including EPD and the City; and

WHEREAS, it is in the environmental and economic best interest of all parties hereto to minimize truck mileage by using the closest landfill, regardless of ownership, and to have the availability of using an alternative landfill when desirable; and

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement, the parties agree as follows:

WITNESSETH:

1.0 Definitions.

“Acceptable waste” means that solid waste allowed in Chapter 9.04 of the City’s City Code and that solid waste which a landfill is permitted to legally accept under the permit issued by the New Mexico Secretary of Environment or under an applicable permit issued to the City of El Paso by the Texas Commission on Environmental Quality. For purposes of this Agreement, this includes “household waste”, as defined in 20.9.2, New Mexico Administrative Code- and “municipal solid waste”, as defined by the Texas Solid Waste Disposal Act, construction and demolition debris, industrial solid waste (categories 1 and 2, as defined by 30 TAC 335) and waste which is not rejected by the landfills. Acceptable waste does not include “hazardous waste,” and “sludge”, as defined in 20.9.2, New Mexico Administrative Code or by the Texas Solid Waste Disposal Act.

“Camino Real Landfill” means the landfill owned by Camino Real Environmental Center, Inc. and located at 1000 Camino Real Blvd., Sunland Park, New Mexico.

“Excluded waste” means solid waste not accepted in accordance with the respective operating permits by either the Camino Real Landfill or the Greater El Paso Regional Landfill.

“Greater El Paso Regional Landfill” means the landfill owned by the City and located at 2300 Darrington Road in Clint, Texas.

“Hazardous waste” means as defined in 30 TAC § 330.3.

2.0 Exchange. Each quarter during the term of this Agreement, the City shall allow EPD trucks to place up to 15,000 tons of acceptable waste in the Greater El Paso Regional Landfill, and Camino Real shall allow City trucks to place up to 15,000 tons of acceptable waste in the Camino Real Landfill at no charge. This tonnage shall be prorated for any period of the term that does not total a consecutive three month period. The quarters shall commence January 1, April 1, July 1 and October 1 of each year.

2.1 In the event either Party exceeds its 15,000 ton quarterly allotment at the other Party’s landfill, the Party in excess agrees to pay to the other Party the amount of \$26/ton for the excess tonnage, subject to 2.1.1 and 2.1.2. below.

2.1.1 Should both Parties exceed their 15,000 ton quarterly allotment at the other Party’s landfill and that excess is an equal amount of acceptable waste, neither Party shall be required to pay for that equal excess amount deposited at the other Party’s landfill.

2.1.2 However, should both Parties exceed their 15,000 ton quarterly allotment at the other Party’s landfill and one Party has deposited a greater excess amount than the other Party, the Party with the greater excess amount of acceptable waste shall be required to pay the amount of \$26/ton solely for that tonnage beyond the equal excess amount.

2.2 There shall be no charge, penalty or fee for either Party delivering less than 15,000 tons per quarter.

2.3 There shall not be a rollover amount from one quarter to the next. If a Party does not deposit up to 15,000 tons per quarter, the amount of unused allotment shall not be transferred over to any subsequent quarter.

2.4 So long as neither Party is in default, the Parties, in the case of the City, by and through the City Manager or designee, may mutually agree that the quarterly acceptable waste allotment should be increased during the term of this Agreement in the manner described in this subsection. In the event both Parties exceed the 15,000 ton allotment during three consecutive months as evidenced on the monthly reports described in this Agreement, one Party, in the case of the City, by and through the City Manager or designee, may issue a written notice to the other Party and propose that the acceptable waste allotment be increased to up to 20,000 tons per quarter. Should the non-proposing Party agree with that quarterly increase, said non-proposing Party shall respond within seven (7) working days in writing that the proposal is accepted. The City Manager or designee may act on behalf of the City regarding this increase, without the need for City Council action.

2.4.1 Should the Parties agree to increase the quarterly allotment to up to 20,000 tons, all references in this Agreement to 15,000 tons shall change to 20,000 tons, including, but not limited to, such references in this Section 2.

2.5 The Parties acknowledge that the Greater El Paso Regional Landfill and the Camino Real Landfill are permitted to receive acceptable waste. Excluded from the 15,000 ton quarterly limit of this Agreement is all specially classified acceptable waste requiring special handling. Should either Party attempt to deposit in the other Party's landfill specially classified acceptable waste requiring special handling, that Party shall pay the posted rates at the other Party's landfill for such waste. Both Parties agree to comply with the waste acceptance restrictions described in this subsection and with each respective landfill's current site operating plan on file with its applicable state regulating agency, which shall be applied in good faith.

3.0 Reporting. The Parties shall furnish to the other Party a written report detailing the amount of acceptable waste expressed in tons deposited by the other Party at the reporting Party's landfill, no later than the 15th day following the termination of each month. Should the 15th day of the month fall on a weekend or holiday as described in this Agreement, the monthly report shall be due on the following business day. The Parties acknowledge that for the City's administrative purposes such as are involved in this Section 3.0, business days do not include Fridays. Each report shall include, but not be limited to the date and quantity of deposit of acceptable waste provided by the non-reporting Party for the prior month.

3.1 In the event that a Party, in the case of the City, by and through the City Manager or designee, disputes the other Party's monthly report, the disputing Party may

audit said report and the reporting Party shall provide any and all accounting records necessary for the disputing Party to perform said audit within seven (7) calendar days of a written request for audit by the disputing Party. The auditing Party must perform their audit within seven (7) calendar days upon receipt of the reporting Party's accounting records. Should the numbers derived by the disputing Party's audit differ from the reporting Party's monthly reported numbers, the Party's shall follow the provisions of Section 13.0 of this Agreement.

- 3.2 Each Party shall provide the tare weight (including fuel and driver) of each collection vehicle (excluding roll offs) owned by that Party either prior to or by weighing it at the time of the first trip made to the other Party's landfill subject to this Agreement. Once a year or in the event of a change to the vehicle, the landfill may verify the tare weight of any vehicle.
- 3.3 Each Party shall weigh the truck of the other Party upon that other Party's truck entering the first Party's landfill, and shall record the tonnage. In addition, all roll off trucks shall be weighed on exiting the landfill to obtain the actual tare weight for each load.

4.0 Reconciliation Payment.

Should the monthly report described in Section 3 of this Agreement indicate that either Party has exceeded the acceptable waste quarterly allotment, and the fee described in Section 2.1 shall be imposed upon either Party, the Party owing the fee shall pay the said fee to the owed Party within thirty (30) days of receipt of the invoice, which invoice shall be sent by the following dates: April 30, July 30, October 30, January 30, for the amount owed in the immediately preceding quarter. This shall be known as a reconciliation payment. Payment under this Section shall be sent to the address appearing on the invoice. Said payment shall not accrue from one quarter to the next, but shall be made each quarter. Failure to make a reconciliation payment on a timely basis shall be considered an event of default, except as described in subsection 4.1.

- 4.1 In the event of a dispute as to the amount of a reconciliation payment, if said dispute is not resolved by the dates indicated in section 4.0 of this Agreement, the Party owing the reconciliation payment shall have an additional ten (10) calendar days from the payment dates set forth in Section 4.0 of this Agreement to provide full payment to the owed Party, subject to the provisions of Section 13.0 of this Agreement.

5.0 Operating Hours. The Parties agree to maintain their current operating hours in accordance with the Greater El Paso Regional Landfill and Camino Real Landfill permits, and agree to notify each other when those operating hours change within the term of this Agreement:

- 5.1 The holidays recognized by both Parties are as follows: New Year's Day (January 1), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day

(first Monday in September), Thanksgiving Day (fourth Thursday in November), Christmas Day (December 25). The Parties acknowledge that neither of the landfills subject to this Agreement shall be required to be open on the holidays listed in this subsection.

- 5.2 The Parties acknowledge that unsafe weather and work conditions could cause a closure of either or both of their landfills that are the subject of this Agreement. To the extent possible, the Parties will notify the other Party of any closures in a timely basis once a Party determines that closure is the best course of action.

6.0 Consideration. The Parties agree to the non-monetary, in-kind consideration of the exchange of landfill usage which promotes the public health goal of environmentally responsible municipal solid waste management and planning. The Parties also agree to the \$26/ton reconciliation payment amount, as it is an amount equal to the tipping fee charged at the City's landfill.

7.0. Term. This Agreement shall begin on May 1, 2012 and shall end no later than August 31, 2014.

8.0 Termination.

- 8.1 Either Party may terminate this Agreement if the other party has breached the Agreement and fails to (a) correct such breach for a period of ten (10) days after receipt of written notice to correct the same or (b) initiate correction of such breach and diligently pursue such correction without undue delay.
- 8.2 In addition, either Party may terminate this Agreement without cause upon thirty (30) days' written notice to the other Party of the intention to terminate this Agreement and stating the termination date.
- 8.3 This Agreement may also be terminated at any time by mutual written agreement of the Parties.
- 8.4 All payments by the City under this Agreement are payable only out of current City revenues. This Agreement shall automatically terminate if the City Council of the City of El Paso fails to appropriate or budget money for the operation of the Greater El Paso Regional Landfill services under this Agreement.
- 8.5 The Parties acknowledge that the Camino Real Landfill is located in the State of New Mexico. EPD and Camino Real state that they, in good faith and after legal review, are of the belief that such landfill may lawfully accept the solid waste delivered to it by the City. In the event it is determined by a competent court of law that such landfill may not lawfully accept out-of-state municipal solid waste, this Agreement shall immediately terminate.

9.0 Independent Contractor. Nothing contained herein shall be construed as creating the relationship of employer and employee between the City and EPD or Camino Real or between the City and EPD's or Camino Real's employees. EPD and Camino Real shall be deemed at all times to be independent contractors. In carrying out the terms of this Agreement, EPD and Camino Real shall select their own employees and such employees shall be and act under the exclusive and complete supervision and control of EPD and Camino Real.

10.0 Insurance Provisions – City's Requirements of EPD. EPD agrees to provide the following as a condition of the Agreement:

10.1 Liability Insurance. For purposes of this Agreement, the Parties shall rely on the insurance that EPD is required to provide in accordance with that certain Solid Waste Franchise Agreement with an effective date of September 1, 2011, granted via ordinance dated August 9, 2011, ("EPD Franchise") by and between the City and EPD.

11.0. Maintenance of Service Records. The Parties shall maintain appropriate records to document in accordance with industry standards and shall make such records available for inspection by the Parties to this Agreement during reasonable business hours after not less than seven calendar (7) days' notice from the requesting Party, in the case of the City, by and through the City Manager or designee, requesting access to same. All such records shall be kept by the Parties throughout the term of this Agreement and for a period of two (2) years thereafter.

12.0. Compliance with Applicable Laws and Regulations. The Parties shall at all times observe and comply with all applicable laws and regulations which in any manner affect the Agreement.

13.0 Dispute Resolution. The Parties hereto agree that reasonable efforts will be made to aid and assist the other in accomplishing the objectives of this Agreement. In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or any breach thereof, either party may, by written notice, demand a meeting regarding the dispute, to be attended by executive officers of each party, who will attempt in good faith to resolve the dispute, claim, question, or disagreement. If the dispute cannot be resolved through executive negotiations within thirty (30) business days after the date of the initial notice, each party will retain all rights to bring an action regarding such matter in accordance with law. The Parties further agree that should their efforts to resolve a dispute, claim, questions, or disagreement arising from this Agreement fail, that before either Party files suit against the other to enforce, or otherwise relating to, the terms of this Agreement, it shall notify the other Party of its intent to sue and request formal mediation to resolve the dispute. Upon delivery and receipt of such notice, the Parties agree to participate in mediation within 120 days of receipt of the request. A Party in good faith may file a formal action to protect its rights prior to completing mediation, however, such formal action may be abated upon request of a Party until the Parties complete participation in the mediation process.

14.0. Venue and Law. For the purposes of determining the place of the Agreement and the law governing the same, this Agreement is entered into in the City and County of El Paso,

State of Texas, and shall be governed by the laws of the State of Texas; provided however, that each landfill shall be governed by the laws and regulations of the State in which it is located. Venue for all purposes shall be in El Paso County, Texas.

15.0 Severability; No Waiver; Reservation of Rights.

15.1 Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Agreement.

15.2 No Waiver; Reservation of Rights. The waiver by any Party of a default or a breach of any provision of this Agreement by another Party shall not operate or be construed to operate as a waiver of any subsequent default or breach. Without limitation upon the foregoing, the making or the acceptance of a payment by any Party with knowledge of the existence of a default or breach shall not operate or be construed to operate as a waiver of any default or breach. Without limitation, in the event of any dispute in the future between the Parties, and/or between the City and any affiliate of EPD and Camino Real (including, by way of example only and without limitation, Waste Connections, Inc.), the Parties hereby agree that: (i) the terms of this Agreement and the Parties' executions, deliveries and performances under this Agreement shall not prohibit, limit, waive or otherwise affect any right to contest the effect, validity or legality of any past, present or future ordinance or action of the City; and (ii) each of the Parties hereby agrees to not plead or otherwise assert in court any such prohibition, limitation, waiver or effect described in (i) immediately above arising from or related to this Agreement and its execution, delivery and performance by the respective Parties. Waste Connections, Inc. is joining in this Agreement or only for the purpose of evidencing its agreement to this Section 15.2 and Section 16 of this Agreement.

16.0. Entire Agreement; Amendment. This Agreement constitutes and expresses the entire agreement between the Parties regarding the contents of this Agreement and supersedes all prior or written agreements and understandings. The parties acknowledge the existence of that certain Solid Waste Disposal and Operating Agreement entered into on April 27, 2004 ("Prior Agreement") and the EPD Franchise. The parties agree that any rights, defenses, and claims lawfully existing and enforceable under or arising from the Prior Agreement or the EPD Franchise are independent of and are not superseded by this Agreement.

16.1 Amendment or Modification. Except as indicated herein, this Agreement shall not be amended or modified except by a written instrument signed by all the Parties.

16.2 Limited Joinder By Waste Connections, Inc. Waste Connections, Inc. is joining, for limited purposes, in this Agreement for purposes of evidencing its consent to Section 15.2 of this Agreement and this Section 16.

17.0 Notices. All notices provided for herein shall be sufficient if delivered in person or sent by certified or registered mail, return receipt requested, postage fully prepaid, or by nationally recognized overnight courier service, addressed to the proper Party at the following addresses:

City: City of El Paso
ATTN: City Manager
2 Civic Center Plaza
El Paso, Texas 79901-1196

with copy to: City of El Paso
ATTN: Director
Environmental Services Department
7968 San Paulo
El Paso, Texas 79907

EPD, Camino Real and/or
Waste Connections, Inc.: El Paso Disposal, LP
District Manager
5539 El Paso Drive
El Paso, Texas 79905

with copy to: Camino Real Environmental Center, Inc.
Attention: District Manager
1000 Camino Real Blvd.
Sunland Park, NM 88063

with copy to: Waste Connections, Inc.
ATTN: General Counsel
10001 Woodloch Forrest Drive, Suite 400
The Woodlands, TX 77380

or to such other addresses as the Parties may designate to each other in writing from time to time.

18.0 Assignment. This Agreement shall not be assigned without the prior written consent of all of the Parties.

19.0 Headings. The headings and captions contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof.

20.0 Attorney's Fees. If any action is brought with regard to this Agreement, the prevailing Party shall be entitled to recover reasonable attorney's fees and costs from the other Party. Such fees and costs: (i) may be set by the court hearing the action or may be enforced in a separate action; and (ii) shall be in addition to any other relief which may be awarded.

21.0. Force Majeure. Notwithstanding anything to the contrary contained in this Agreement, no Party shall be liable to the other for any failure or delay in the performance of any obligation under this Agreement due to the occurrence of an event constituting force majeure and any such failure or delay shall not constitute an event of default under this Agreement. An event constituting force majeure is any act, event, or condition, which is beyond the reasonable control of the Party(ies) adversely affected thereby that has had, or may reasonably be expected to have, a materially adverse effect on the rights or obligations of the Parties under this Agreement, and shall include, but not be limited to, the following: an act of God, fire, explosion, flood, war, sabotage, strike, change in law, or condemnation; provided, however, notwithstanding the foregoing, a change in law effected by the City shall not be an event constituting force majeure for purposes hereof.

22.0. Binding Agreement. Each Party acknowledges that each individual signing this Agreement on its behalf is authorized to do so, and further warrants that each such individual is authorized to commit and bind the Party for whom he or she is signing to the terms and conditions of this Agreement. The El Paso City Council has approved the form of this Agreement and has expressly authorized City to enter into this Agreement.

23.0 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be considered an original but all of which taken together shall constitute but one (1) instrument.

(Signatures follow on next page)

STATE OF TEXAS)
)
COUNTY OF EL PASO)

WASTE EXCHANGE AGREEMENT

Signature Page

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first appearing on this Agreement.

CITY OF EL PASO

Joyce A. Wilson,
City Manager

APPROVED AS TO FORM:

Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT:

Ellen A. Smyth
Ellen A. Smyth, P.E., Director
Department of Environmental Services

EL PASO DISPOSAL, LP

Rodney Smith
By: Waste Connections of Texas, LLC
Its: General Partner

By: Waste Connections Management
Services, Inc.
Its: Manager

Ron Mittelstaedt
By: _____
Name Printed: RON MITTELSTAEDT
Title: CHAIRMAN / CEO
Date: 4-5-2012

CAMINO REAL ENVIRONMENTAL
CENTER, INC.

Ron Mittelstaedt
By: _____
Name Printed: RON MITTELSTAEDT
Title: CHAIRMAN / CEO
Date: 4-5-2012

Joined ONLY for purposes of memorializing its agreement with respect to Sections 15.2 and 16 of this Agreement by:

WASTE CONNECTIONS, INC.

By: 

Name Printed: RON MITTELSTAEDT

Title: CHAIRMAN / CEO

Date: 4-5-2012